

Innovation Markets: An Overview

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Ronald W. Davis
Atlanta, GA

For a more detailed discussion see Ronald W. Davis,
*Innovation Markets and Merger Enforcement: Current
Practice in Perspective*, 71 Antitrust L.J. 677 (2003)

Threshold Issues

- Does antitrust care about non-price competition?
 - In a merger context?
- Statutory bar to merger enforcement without a current product market?
- Prudential bar to enforcement?
 - ┌ Too hard to find the facts?
 - ┌ Too hard to make valid predictions?

What's the Point of Enforcement?

- Regular markets: more **output** good, less output bad
- Innovation: more R&D **input** may not be good, and less may not be bad
- In principle, you look for the **optimal** amount of R&D, not the greatest amount
- But how do you know what's the optimal amount?

Of Markets and “Markets”

To do antitrust merger enforcement to protect innovation, should we “define a market”?

- No buyers, no sellers in “innovation markets”
- Innovation: one of many steps in preparing to compete
- IP Guidelines definition: R&D for particular new goods or processes + close substitutes for that R&D

Who's in the “Market”— and What are they Doing?

- IP Guidelines: those firms with the relevant assets and characteristics
- How to find them?
- How do know what they are doing?

Market Structure and Non-Price Competition

- What market structure best promotes innovation?
 - Monopoly?
 - High concentration?
 - Moderate concentration?
 - Low concentration?
- Any sound basis for presumptions—favorable or adverse?

Good Presumptions

- IP Guidelines (1995) safe harbor: 4 or more other firms
- Competitor Collaboration Guidelines (2000): safe harbor: 3 or more other firms
 - But, if it's "merger-like," see the Merger Guidelines
 - Which, BTW, say nothing about innovation markets!

Bad Presumptions

- Merger Guidelines § 1.51 c):
“Where the post-merger HHI exceeds 1800, it will be **presumed** that mergers producing an increase in the HHI of more than 100 points **are likely to create or enhance market power or facilitate its exercise**. The presumption may be overcome”
- Position of Commissioners Thompson and Harbour
- Chairman Muris' view
- And Commissioners Leary and Swindle?

The Presumptions Debate: Where's the Beef?

Are we debating

- Whether the Genzyme deal was worth a close look?
- Whether facts could demonstrate no injury to competition?
- Whether prosecutors should prosecute (and courts will find liability) without a “story” of competitive injury?
- └ Who bears the risk of nonpersuasion?
- └ Whether the Commission could argue “prima facie case” in court?

Genzyme: Presumptions or Stories?

- The deal foreclosed (or not) a race for Orphan Drug Act exclusivity
- It foreclosed (or not) a possible challenge to first generation Pompe disorder therapy
- R&D synergies did (or did not) exist
 - And were (or weren't) merger specific
- Two tracks of R&D in the combined firm were better (or worse) than independent R&D
- Genzyme had an anticompetitive motive (or didn't)